

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3520/P1dn
EVM:kjf:md

November 16, 2009

ATTN: Sen. Pat Kreitlow

Please review the attached draft carefully to ensure that it is consistent with your intent. The following are several issues you may wish to consider in reviewing this draft.

1. The most significant change from the proposed language is the creation of a local review procedure for parties aggrieved by the alleged inconsistency of a covered ordinance with the comprehensive plan. The procedure may be more involved than desired, but I believe many of the elements I have added are necessary to ensure significant deference by the courts to local determinations regarding consistency. Please let me know if you want portions of the procedure removed or otherwise altered.

Generally, I have attempted to retain most elements of the provided language, but added further requirements, generally adapted from either ch. 68 or 227, stats., to make the procedure workable and more likely to accomplish the intended effect. In brief, my additions are designed to provide basic due process protections to the aggrieved party, and, thereby, to ensure that the local governing body's determination is sufficiently informed and formal to be given deference by the courts. I added the certiorari review requirement because this sort of review will require the court to limit its review to the final determination of the governing body and do so under a deferential standard.

Specifically, I retained the concept of planning commission review and recommendation and the governing body's action upon that recommendation as the final decision. To this I added: 1) a specific aggrieved party standard; 2) more specificity regarding the initiation of review; 3) various time limits; 4) a notice of hearing requirement; 5) several due process hearing requirements, including the right of an aggrieved party to present evidence and argument and an impartial decision maker; 6) a record keeping requirement; 7) a written decision requirement; and 8) certiorari review of the final decision. Please let me know if you want any changes to the procedure.

2. I have not included any language indicating that a comprehensive plan is only advisory or not a regulation simply by being enacted as an ordinance. I believe adding such language would be more likely to create, rather than avoid, ambiguity. It is clear from the current statute that comprehensive plans do have some regulatory effect, a

separate statutory provision denying the intent to have regulatory effect could create a conflict. Also, including the language that an ordinance enacting a comprehensive plan does not make the comprehensive plan a regulation may have unpredictable effects depending upon the form of ordinance passed by the local governmental unit. For example, a local governmental unit may intend for an ordinance enacting a comprehensive plan to have effects beyond those imposed by s. 66.1001 (3), stats. A provision indicating that an ordinance enacting a comprehensive plan does not have regulatory effect may render the ordinance ambiguous.

If there is some confusion regarding the effect of the comprehensive plan on local ordinances or regulations, perhaps some clarifying changes could be made to the substantive portions of s. 66.1001, stats.

3. The changes to s. 66.1001 (3) (g), (h), and (q) may have the effect of creating a loophole for local governments who wish to make certain changes without ensuring their consistency with the comprehensive plan. For example, official maps of a city may be established by ordinance or resolution under s. 62.23 (6) (b), stats. If s. 66.1001 (3) (g) is changed to only apply to official mapping ordinances, a city may establish an official map of the city by resolution to avoid the necessity of complying with its comprehensive plan. Please let me know if you want any changes to this section.

4. I omitted the requested change to s. 66.1001 (1) (a) (2) because this change, as currently worded, will not have any significant effect. Under current statutes, a town does not have authority to exercise powers, including adopting a master plan, under s. 62.23, stats., absent the exercise of village powers under s. 60.22 (3), stats., which cannot be exercised absent the authorization of the town meeting under s. 60.10 (2) (c), stats. Therefore, the words removed in the provided language would not permit a town to adopt a master plan in any situation not currently permitted.

If you wish to broaden the powers of a town regarding the adoption of a master plan, please consider how you would like to accomplish this. One option is to simply remove the requirement that exercise of village powers be authorized by the town meeting. Under this option, a town could simply opt to exercise village powers, including acting under s. 62.23, stats. Another option is to create a parallel comprehensive planning statute for inclusion in the towns chapter. Yet another option is to simply permit towns, with or without approval of the town meeting, to act under 62.23, stats. This final option, however, may not be different in any significant way from the status quo.

5. Rather than define "consistency" for purposes of the review process, I changed the standard in s. 66.1001 (3), stats., to "not inconsistent." Please let me know if you want this changed.

6. I treated ss. 59.69 (3) (a) and 62.23 (3) (b), stats., to conform these statutes to this draft. Please let me know if these changes are not what you intend.

7. I omitted the changes to ss. 66.1001 (4) (c) and (d), stats., that appeared in the document labeled DRAFT 2/2/09. These changes were not mentioned in the August 7, 2009, memo and it is unclear to me what was the intent for these changes. Though statutory law does not provide any specific requirements, ordinances are generally

used for matters of a general and permanent nature and resolutions are generally used for matters that are temporary or of limited applicability. It appears that the adoption of a master plan is both generally applicable and permanent. Please let me know if you want the changes from the proposed language added to this draft.

8. I have not provided any initial applicability or effective dates. Please let me know if you believe any are needed.

Please let me know if you would like any changes made to the attached draft or if you have any questions. If the attached draft meets with your approval, let me know and I will convert it to an introducible “/1” draft.

Eric V. Mueller
Legislative Attorney
Phone: (608) 261-7032
E-mail: eric.mueller@legis.wisconsin.gov